

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

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COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0311-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
RICHARD A. POTTER,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. CR2004-317

Honorable R. Douglas Holt, Judge

REVIEW GRANTED; RELIEF DENIED

Richard Potter

Tucson
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Pursuant to a guilty plea, petitioner Richard A. Potter was convicted of promoting prison contraband, a class five felony. The trial court sentenced him to a stipulated, presumptive, 1.5-year prison term, with no credit for time served, to be served consecutively to the seventeen-year sentence Potter was already serving. In this pro se petition for review of the trial court's denial of his petition for post-conviction relief, filed

pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., Potter contends he was entitled to 299 days of presentence incarceration credit.¹ We will not disturb a trial court’s decision to grant or deny post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse of discretion here.

¶2 Section 13-709(B), A.R.S., provides that a defendant is entitled to credit for “[a]ll time actually spent in custody pursuant to an offense” In addition, as Potter has noted, the plea agreement provided that he is “entitled to credit for days of pretrial incarceration.” Potter thus argues that, based on both § 13-709(B) and the language in the plea agreement, he is entitled to credit for the time he spent in custody between his arrest on November 3, 2004, and his sentencing, on August 29, 2005. After the trial court summarily denied Potter’s request, the court granted oral argument on his petition for rehearing, subsequently denying that request for relief “because [Potter] was not held in the Graham County Jail during his pretrial incarceration.”

¶3 Importantly, at the change-of-plea hearing, defense counsel told the court with Potter present, “There’s an issue as to whether or not [Potter is] going to get credit for time served. He seems to think that he is. Honestly, I don’t know the answer off the top of my head. We need to kind of sort that out.” The trial court instructed counsel to “sort it out.” At sentencing, counsel again raised this issue.

¹Potter has intermittently requested credit for 229 and 299 days. However, in light of our ruling, the actual figure is inconsequential.

Your Honor, the only thing I'd like to mention is that my client has a . . . position regarding the credit for time served. He believes that because he was transported to Graham County and taken into custody there and that a bond was issued that he's therefore entitled to credit for time served from the time he was arrested and brought to Graham County until now.

¶4 At sentencing, the trial court denied Potter's request for credit, and Potter said nothing, nor did he say anything when the court sentenced him and stated that Potter would receive "[n]o credit for time served." Although it may fairly be said that Potter was in custody pursuant to both this offense and his earlier conviction during the relevant time period, he is not entitled to double credit for presentence incarceration for time spent in custody waiting for his consecutive sentence in this case to begin. *See State v. Bridgeforth*, 156 Ariz. 58, 59, 750 P.2d 1, 2 (App. 1986) (a defendant serving a sentence pursuant to an earlier conviction at the time of arrest is only entitled to credit for time actually spent in custody pursuant to the offense from the earliest release date for the previous offense), *aff'd as modified*, 156 Ariz. 60, 750 P.2d 3 (1988). In addition, as Division One stated in *State v. McClure*, 189 Ariz. 55, 57, 938 P.2d 104, 106 (App. 1997), relying on *State v. Cuen*, 158 Ariz. 86, 88, 761 P.2d 160, 162 (App. 1988), and *State v. Jackson*, 170 Ariz. 89, 94, 821 P.2d 1374, 1379 (App. 1991), "[w]hen consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of those sentences, even if the defendant was in custody pursuant to *all* of the underlying charges prior to trial."

¶5 We also note that, although Potter argues on review he "never would have agreed to the plea if it did not stipulate that he would receive credit for his pretrial

incarceration,” he did not raise this argument in his Rule 32 petition. Accordingly, it is not properly before us. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii). In any event, even if Potter had so argued to the trial court, he has not asked to withdraw from the plea agreement, nor has he argued that his plea was not knowing, voluntary, and intelligent.

¶6 Because the trial court did not abuse its discretion by denying post-conviction relief, the petition for review is granted, but relief is denied.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge